

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HARRIET KOLLMAN and FEDERAL JUDICIARY,  
DISTRICT COURT, Newark, N.J.

*Docket No. 96-2188; Submitted on the Record;  
Issued June 25, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization of right shoulder surgery.

On March 23, 1995 appellant, then a 59-year judicial secretary, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured both knees, right wrist and right cheek, right ankle, right arm and shoulder area when she slipped on the wet marble floor on March 21, 1995. The Office accepted the claim for contusion: right cheek, right ankle, right arm and shoulder, both knees and right wrist.

In an attending physician's supplemental report (Form CA-20a) dated September 5, 1995, Dr. Kent S. Lerner, appellant's attending Board-certified orthopedic surgeon, recommended diagnostic arthroscopy. Dr. Lerner also indicated that appellant would most likely need subacromial decompression of the right shoulder.

In a letter dated August 31, 1995, Dr. Lerner stated:

"The above patient is indicated for subacromial decompression of the right shoulder which is secondary to traumatic impingement syndrome sustained in a fall on March 21, 1995.

"Conservative treatment consisting of Cortisone injections and rotator cuff exercises has failed to improve the patient.

"The plan is for the patient to undergo arthroscopy and subacromial decompression. There is a possibility she has a rotator cuff tear which will be explored at the time and, if necessary, it will be repaired."

In a letter dated September 29, 1995, Dr. Lerner noted the history of appellant's employment injury and that he initially treated her for her complaints regarding her knees. He noted that she also complained of shoulder pain and that it became worse in June 1995.

On October 25, 1995 the Office medical adviser, opined that surgery should not be authorized as a "type III acromion has obviously been present since skeletal maturity and does not in of itself indicate need for surgery."

By letter dated October 27, 1995, the Office referred appellant to Dr. Allan S. Glushakow, a Board-certified orthopedic surgeon and internist, for a second opinion on whether the requested surgical procedure is due to appellant's accepted employment injury.

In a report dated November 1, 1995, Dr. Glushakow diagnosed "spur of the acromium of the right shoulder which is related to degenerative arthritic condition and that this condition is unrelated to the accepted employment injury of March 21, 1995. Dr. Glushakow stated that his opinion was based on the fact that appellant had no problem with her shoulder initially and that she injured it performing spring cleaning. Dr. Glushakow agrees with Dr. Lerner that an arthroscopic evaluation is indicated, but disagrees that it is unrelated to appellant's employment injury.

By decision dated November 2, 1995, the Office denied appellant's request for surgery for her right shoulder. The Office relied upon the opinion of the Office medical adviser and Dr. Allen Glushakow, the second opinion physician, in finding that appellant's right shoulder surgery is not casually related to her accepted employment injury.

On March 19, 1996 appellant requested reconsideration of the denial of her request for approval of her surgery. In support of her request, appellant submitted an undated letter from her treating physician, Dr. Lerner.

In an undated letter, Dr. Lerner noted that appellant underwent arthroscopic surgery of her right shoulder joint and a subacromial decompression. Dr. Lerner noted:

"At the time of subacromial decompression1(sic) the patient was found to have a large, partial thickness rotator cuff tear, which was in the form of a flap with one end detached. Judging by the age of this also by the history given to me, in all medical probability, this condition was caused by the accident at work on March 21, 1995. At the very least, (sic) the March 21, 1995, accident aggravated the condition to the point that the patient needed surgery to relieve her symptoms."

Dr. Lerner also noted that rotator cuffs tears are not part of the normal aging process and "may be caused by a traumatic incident, such as the patient experienced on March 21, 1995."

By decision dated May 17, 1996, the Office denied appellant's request for modification of the denial of her request for authorization for surgery. In the attached memorandum, the Office found that the evidence of record, as indicated by the opinion of Dr. Glushakow, supported that she sustained an injury to her shoulder during spring cleaning.

The Board finds that the case is not in posture for decision as there remains an unresolved conflict in the medical evidence between the opinions of Drs. Lerner, Glushakow and the Office medical adviser.<sup>1</sup>

Section 8103(a) of the Federal Employees' Compensation Act states in part: "the United States shall furnish to an employee who was injured while in the performance of duty the services, appliances, and supplies prescribed by a qualified physician which the Secretary of Labor considers likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation."<sup>2</sup>

The Office obligation to pay for medical treatment under section 8103 of the Act extends only to treatment of employment-related conditions and appellant has the burden of establishing that the requested treatment is for the effects of an employment-related condition. Proof of causal relation must include rationalized medical evidence.<sup>3</sup>

In the present case, the Office accepted that appellant sustained a trauma to both knees, right wrist, right cheek, right ankle, right arm and shoulder. In a CA-20a form Dr. Lerner indicated that appellant would require a subacromial decompression of her right shoulder. Dr. Lerner in his letters dated August 31, 1995 and an undated letter following appellant's surgery, opined that the subacromial decompression of the right shoulder was due to her accepted injury of March 21, 1995. In the undated letter, Dr. Lerner further stated that appellant has sustained a rotator cuff tear which is due to a traumatic event such as the one appellant sustained on March 21, 1995.

However, the Office medical adviser, in his October 27, 1995 report, opined that the surgery was unnecessary. The Office medical adviser opined that a type II acromion "does not in of itself indicate need for surgery." In addition, Dr. Glushakow, the second opinion physician, opined that the surgery was not related to appellant's employment injury, but was rather due to a degenerative arthritic condition and the fact that appellant injured her shoulder while she was spring cleaning.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding whether appellant's condition was caused or aggravated by her March 21, 1995 employment injury.

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<sup>1</sup> On appeal, appellant submitted new evidence, a letter from her supervisor dated March 21, 1995. The Board, however, is precluded from reviewing evidence submitted for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. § 8103(a).

<sup>3</sup> *See Zane H. Cassell*, 32 ECAB 1537 (1981).

The Office of Workers' Compensation Programs decisions dated May 17, 1996 and November 2, 1995 are set aside and the case remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.  
June 25, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member